

**KNOX
McLAUGHLIN
GORNALL
& SENNETT**

A Professional Corporation

120 West Tenth Street
Erie, Pennsylvania 16501-1461
814-459-2800
Fax 814-453-4530
www.kmglaw.com

RICHARD H. ZAMBOLDI
JACK M. GORNALL
HARRY K. THOMAS
MICHAEL A. FETZNER
MICHAEL J. VISNOSKY
DONALD E. WRIGHT, JR.
RICHARD W. PERHACS
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R. PERRIN BAKER
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ELLIOTT J. EHRENREICH
TIMOTHY S. WACHTER

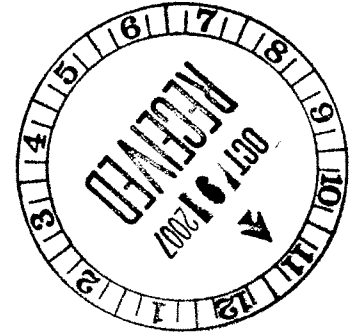
OF COUNSEL:
WILLIAM C. SENNETT
HARVEY D. McCLURE

220413
ENTERED
Office of Proceedings

October 5, 2007

OCT 9 2007

Part of
Public Record



Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Washington DC, 20423-0001

RE: Bessemer and Lake Erie Railroad Abandonment in Erie
County, Pennsylvania, AB-88 (Sub-No. 5X)

Dear Mr. Williams:

In this motion Northwest Pennsylvania Trail Association ("NWPTA") and Material Recovery of Erie, Inc. ("Material Recovery") jointly seek to substitute NWPTA for Material Recovery as interim trail user for the nearly six-mile strip of land above-referenced.

Please find the following documents enclosed with this motion:

1. An original and ten copies of the "Joint Motion of the Northwest Pennsylvania Trail Association and Material Recovery of Erie, Inc. for Substitution of New Interim Trail User."
2. A Statement of Willingness to Assume Financial Responsibility filed on behalf of NWPTA, attached as Exhibit 1.
3. A copy of the extant Notice of Interim Trail Use, attached as Exhibit 2.
4. Documents that supplement the joint motion, attached as Exhibits 3-8.

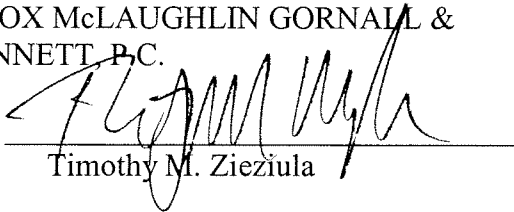
Within thirty (30) days of the effective date of this substitution, NWPTA will assume the duties and responsibilities as interim trail user from Material Recovery. If you have any questions or need additional information, please feel free to contact me at (814) 459-2800.

In addition, please note that separate from this motion, under Docket No. FD-35082, NWPTA, Material Recovery and First Energy recently filed a joint reply to Petitioner's Petition for Declaratory Order. For purposes of

judicial economy, NWPTA and Material Recovery kindly request the court to consider and address both filings together.

Very truly yours,

KNOX McLAUGHLIN GORNAIL &
SENNETT, P.C.

By: 

Timothy M. Zieziula

INIT:init

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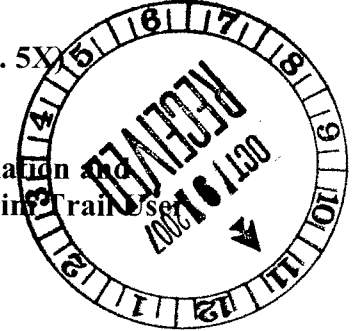
cc: Canadian National Railroad Company;
Thomas J. Healey, Attorney for Bessemer and Lake Erie
Railroad Company;
Robert N. Gentile, General Counsel & Secretary for Bessemer
and Lake Erie Railroad Company;
Donald Bartlett Smith, Attorney for Victor Wheeler, Et. Al.;
William T. Morton, Attorney for Material Recovery

BEFORE THE SURFACE TRANSPORTATION BOARD

Bessemer and Lake Erie)
Railroad Abandonment in Erie,)
County, Pennsylvania)

Docket No. AB-88 (Sub-No. 5X)

**Joint Motion of the Northwest Pennsylvania Trail Association and
Material Recovery of Erie, Inc. for Substitution of New Interim Trail User**



Introduction

Pursuant to 49 C.F.R. § 1152.29(f), Northwest Pennsylvania Trail Association ("NWPTA") and Material Recovery of Erie, Inc. ("Material Recovery") submit this joint motion requesting that the Surface Transportation Board ("STB"): (1) reopen the proceeding in AB-88 (Sub-No. 5X); (2) vacate the existing Notice of Interim Trail Use ("NITU") naming Material Recovery as interim trail user; and thereafter (3) issue an appropriate replacement NITU naming NWPTA as interim trail user. Upon the granting of this motion, NWPTA will be named the interim trail user of the 5.73 mile corridor that was the subject of the initial NITU served on January 3, 1990 in the above-captioned proceeding, wherein Material Recovery was named interim trail user for the portion of the rail corridor between Survey Station 308+85, at or near Lexington, and a point near Survey Station 6+00, about 1.5 miles west of Lake City, Erie County, Pennsylvania.

Background

In 1990, the Interstate Commerce Commission ("ICC"), the predecessor to the STB issued a decision granting Material Recovery an NITU.¹ This allowed Material Recovery to purchase the Trail from B&LE and prevented the Trail from being abandoned. From 1990 through 1997, Material Recovery continued as owner of the Trail, removed the railroad

¹ Bessemer and Lake Erie Railroad Company -- Abandonment Exemption -- in Erie County, Dkt. No. AB 88 (Sub-No. 5X), served Jan. 3, 1990, attached as Exhibit 2.

equipment that was on the Trail, and allowed for its use as a Trail. During this period of time the Material Recovery's ownership of the Trail was never challenged.

In 1997, Material Recovery was in bankruptcy and, as part of the bankruptcy proceeding, sought to grant a utility easement to Pennsylvania Electric Company ("Penelec") over the Trail.² This conveyance was challenged by adjacent landowners, who disputed Material Recovery's ownership of the Trail. As a jurisdictional matter, the Bankruptcy court referred this challenge to the STB and, in 1997, the STB issued a decision declaring that the Trail was railbanked and at no time had the Trail reverted to the adjacent landowners.³ After the STB rendered its decision, the Bankruptcy Court approved Material Recovery's easement conveyance to Penelec. It is important to note that in this conveyance Material Recovery did not convey the entire Trail to Penelec, but rather merely granted an easement over the Trail. Neither the STB decision, nor the Bankruptcy Court's decision were ever appealed, seemingly foreclosing Petitioners from the prospect of further litigation regarding the railbanking status of the Trail. Since 1997, Material Recovery has remained both the record owner of the Trail and the financially responsible party for the Trail.⁴

In 2005, Material Recovery and NWPTA entered into an Agreement of Sale wherein NWPTA purchased other real property from Material Recovery. Material Recovery and NWPTA also entered into a "Donation Agreement" with Material Recovery dated September 20, 2005 wherein the two parties contemplated the future donation of the Trail to NWPTA.⁵ Pursuant to the terms of the Donation Agreement, Material Recovery remained the owner of the

² *In re* Material Recovery of Erie, Inc., Case No. 94-10812 (Bankr. W.D.Pa. 1999), attached as Exhibit 3.

³ Bessemer and Lake Erie Railroad Company -- Abandonment Exemption -- in Erie County, Dkt. No. AB 88 (Sub-No. 5X), served May 21, 1997, attached as Exhibit 4.

⁴ Easement, Feb. 17, 2000, attached as Exhibit 5.

⁵ Agreement for Sale of Real Estate and Donation Agreement and Extension Agreement, Sept. 20, 2005, attached as Exhibit 6.

Trail until such time as the conditions precedent to the transfer and donation were completed. On April 11, 2006, the adjacent landowners again instituted an action, this time in the District Court for the Western District of Pennsylvania, alleging that Material Recovery and the NWPTA had violated the provisions of 49 CFR 1152.29(f) by transferring ownership of the Trail without fulfilling the regulatory requirements described therein. This action was based in part on the adjacent landowner's conviction that both the ICC (in 1990) and STB (in 1997) improperly determined and improperly re-affirmed the Trail's railbanked status.

The District Court concluded that pursuant to 28 U.S.C. §§ 2321 and 2342(5), which states that an order of the STB is subject to exclusive review in the United States Court of Appeals in the Circuit within which the property is located, the adjacent landowners failed to file a timely appeal to the appropriate Circuit Court and as a result the STB order could not be directly or collaterally attacked in any other court.⁶ The District Court further concluded that even where the District Court might have jurisdiction under 28 U.S.C. § 1336(a), which states that "the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Surface Transportation Board. . . ," primary jurisdiction lies with the STB. Thus, because of the specialized nature of this action, the District Court denied the adjacent landowners respective motions to dismiss or, in the alternative, for summary judgment and referred the matter to the STB for further proceedings.

Discussion

As previously mentioned, in 2005, Material Recovery and NWPTA entered into a Donation Agreement ("Agreement") that contemplated the future donation of the Trail to NWPTA, expressly conditioning the transfer on both parties first obtaining STB approval. Although NWPTA has not yet obtained ownership of the Trail, the Agreement is an initial step

⁶ *Wheeler v. Material Recovery of Erie, Inc.*, 2007 WL 1007595 (W.D.Pa), attached as Exhibit 7.

that, if pursued by the parties, will allow NWPTA to obtain ownership. The Agreement contemplated a future transfer of the Trail to NWPTA in early 2006, which was later extended to last until April of 2006. Despite the parties failure to effectuate the Agreement in the allotted time, prior to the filing of this joint motion, NWPTA and Material Recovery reaffirmed the Agreement and entered into another extension of the Agreement, this time stipulating that the transfer will be finalized within thirty (30) days of the STB's approval of this motion and issuance of the updated NITU.⁷ Therefore, only after the STB approves the motion and issues the updated NITU will NWPTA obtain ownership and assume financial responsibility of the Trail.

In its Statement of Willingness to Assume Financial Responsibility, NWPTA has agreed to "assume full responsibility for management of, for any legal liability arising out of the transfer or use of, and for payment of any and all taxes that may be levied or assessed against the right-of-way owned by Material Recovery and operated by Material Recovery" at the future date of transfer.⁸

Since the issuance of the NITU, Material Recovery has maintained the rail corridor for interim trail use, and, apart from the utility easement previously granted to Penelec, has not sold, or offered for sale, any parcels of land that would interfere with interim trail use of the Erie County portion of the corridor covered in the NITU.

Conclusion

Therefore, NWPTA and Material Recovery jointly request in this motion that STB: (1) reopen the proceeding in AB-88 (Sub-No. 5X); (2) vacate the existing order that recognizes Material Recovery as the interim trail manager for the line; and (3) issue a replacement order

⁷ Reaffirmation and Extension of Donation Agreement, attached as Exhibit 8.

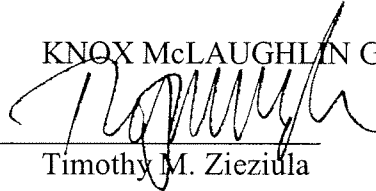
⁸ Statement of Willingness to Assume Financial Responsibility, attached as Exhibit 1.

stating that NWPTA is now the interim trail manager for that portion of the line extending between Survey Station 308+85, at or near Lexington, and a point near Survey Station 6+00, about 1.5 miles west of Lake City, Erie County, Pennsylvania.

Respectfully submitted,

KNOX McLAUGHLIN GORNALL & SENNETT, P.C.

By:



Timothy M. Zieziula

Counsel of Record for Northwest
Pennsylvania Trail Association

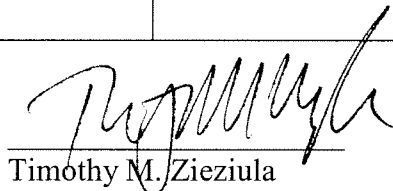
120 West Tenth Street
Erie, Pennsylvania 16501-1461
(814) 459-2800

739224

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of September, 2007, I have served a true and accurate copy of the foregoing motion on the following parties by first-class mail, postage pre-paid:

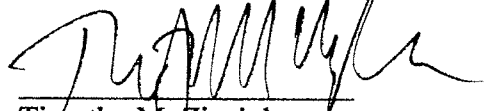
Canadian National Railroad Company 935 de La Gauchetiere Street West Montreal, Quebec H3B 2M9	Thomas J. Healey Attorney for Bessemer and Lake Erie Railroad Company 17641 S. Ashland Avenue Homewood, IL 60430-1339
Robert N. Gentile General Counsel & Secretary Bessemer and Lake Erie Railroad Company P.O. Box 68 135 Jamison Lane Monroeville, PA 15146	William T. Morton Attorney for Material Recovery Agresti Morton & Moore 4934 Peach St. Erie, PA 16509
Donald Bartlett Smith Attorney for Victor Wheeler, Et. Al. 7800 Perry Highway Pittsburgh, PA 15237	



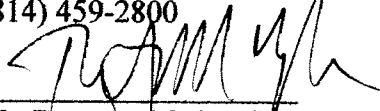
Timothy M. Zieziula
Counsel of Record for Northwest Trails Association
Knox McLaughlin Gornall & Sennett, PC
120 West Tenth Street
Erie, Pennsylvania 16501-1461
(814) 459-2800

STATEMENT OF VERIFICATION

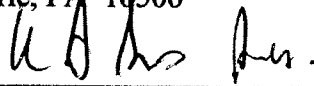
I, Timothy M. Zieziula, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading. Executed on September ___, 2007.



Timothy M. Zieziula
Knox McLaughlin Gornall & Sennett, PC
120 West Tenth Street
Erie, Pennsylvania 16501-1461
(814) 459-2800



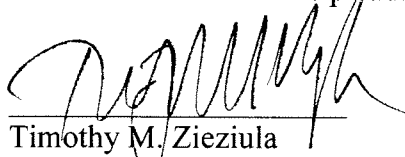
for Mr. Raymond Schreckengost, President
Northwest PA Trail Association
3505 Tanager Drive
Erie, PA 16506



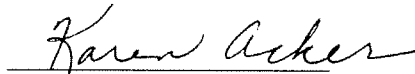
Mr. Richard A. Sommers, President
Material Recovery of Erie, Inc.
Box 1102
Chardon, OH 44024

STATEMENT OF VERIFICATION

I, Timothy M. Zieziula, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading. Executed on October 5th, 2007.



Timothy M. Zieziula
Knox McLaughlin Gornall & Sennett, PC
120 West Tenth Street
Erie, Pennsylvania 16501-1461
(814) 459-2800



Ms. Karen Acker, Secretary
Northwest PA Trail Association
5459 Sebago Dr.
Fairview, PA 16415

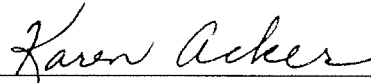
STATEMENT OF WILLINGNESS TO ASSUME FINANCIAL RESPONSIBILITY

In order to establish interim trail use and rail banking under 16 U.S.C. 1247(d) and 49 CFR 1152.29, NWPTA is willing to assume full responsibility for management of, for any legal liability arising out of the transfer or use of, and for payment of any and all taxes that may be levied or assessed against the right-of-way owned by Material Recovery of Erie, Inc. and operated by Material Recovery of Erie, Inc.

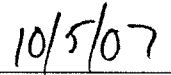
The property known as E&P Branch, extends from Thornton Junction south to the junction of B&LE Albion to Conneaut Branch, a distance of 5.73 miles in Erie County, Pennsylvania. The right-of-way is part of a line of railroad proposed for abandonment in STB Docket No. AB-88 (Sub-no. 5X).

A map of the property depicting the right-of-way is attached.

NWPTA acknowledges that use of the right-of-way is subject to the user's continuing to meet its responsibilities described above and subject to possible future reconstruction and reactivation of the right-of-way for rail service. A copy of this statement is being served on the railroad on the same date it is being served on the Board.

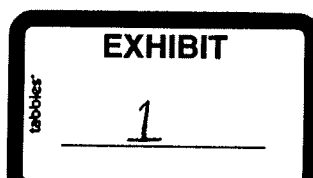


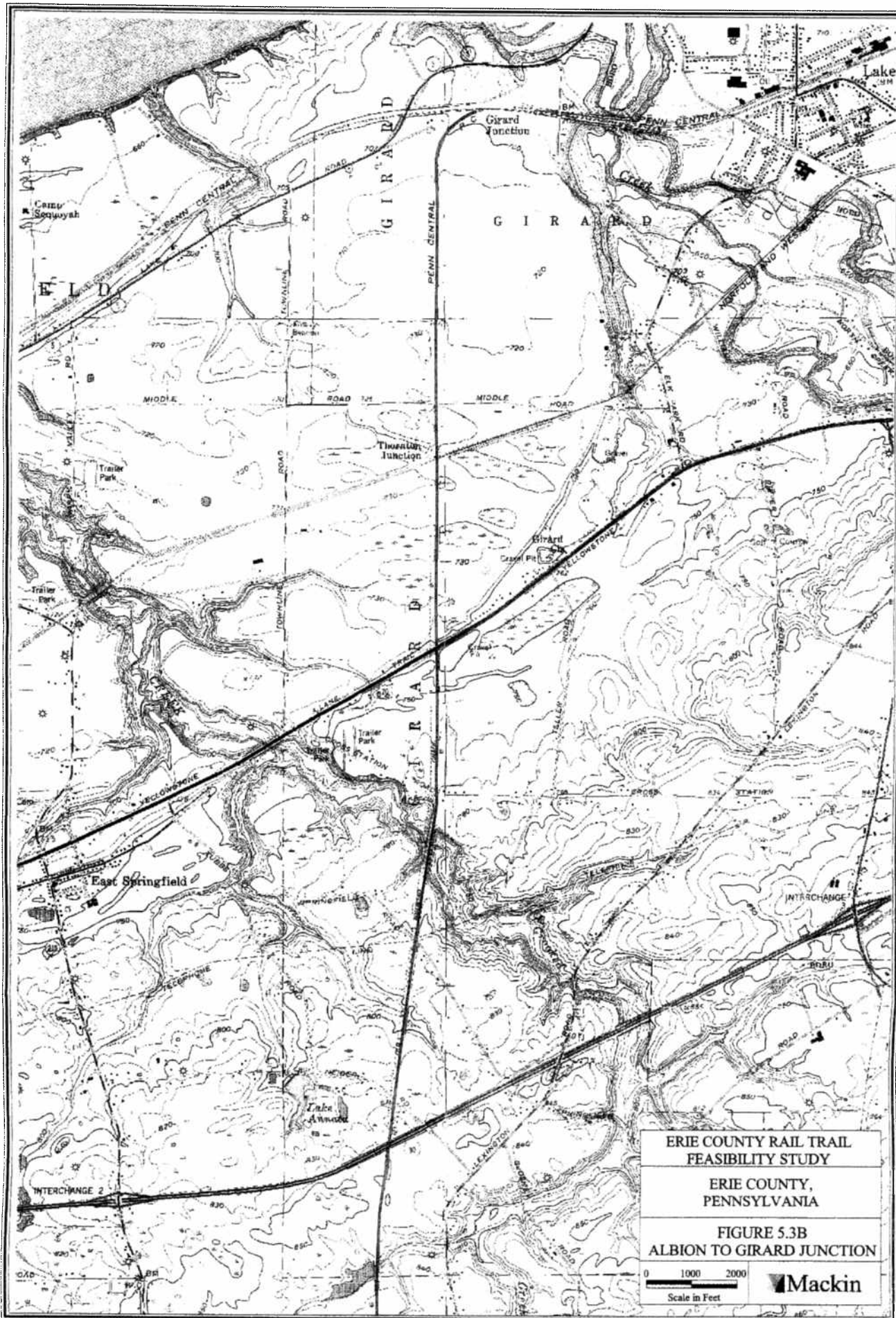
Ms. Karen Acker, Secretary
Northwest PA Trail Association
5459 Sebago Dr.
Fairview, PA 16415



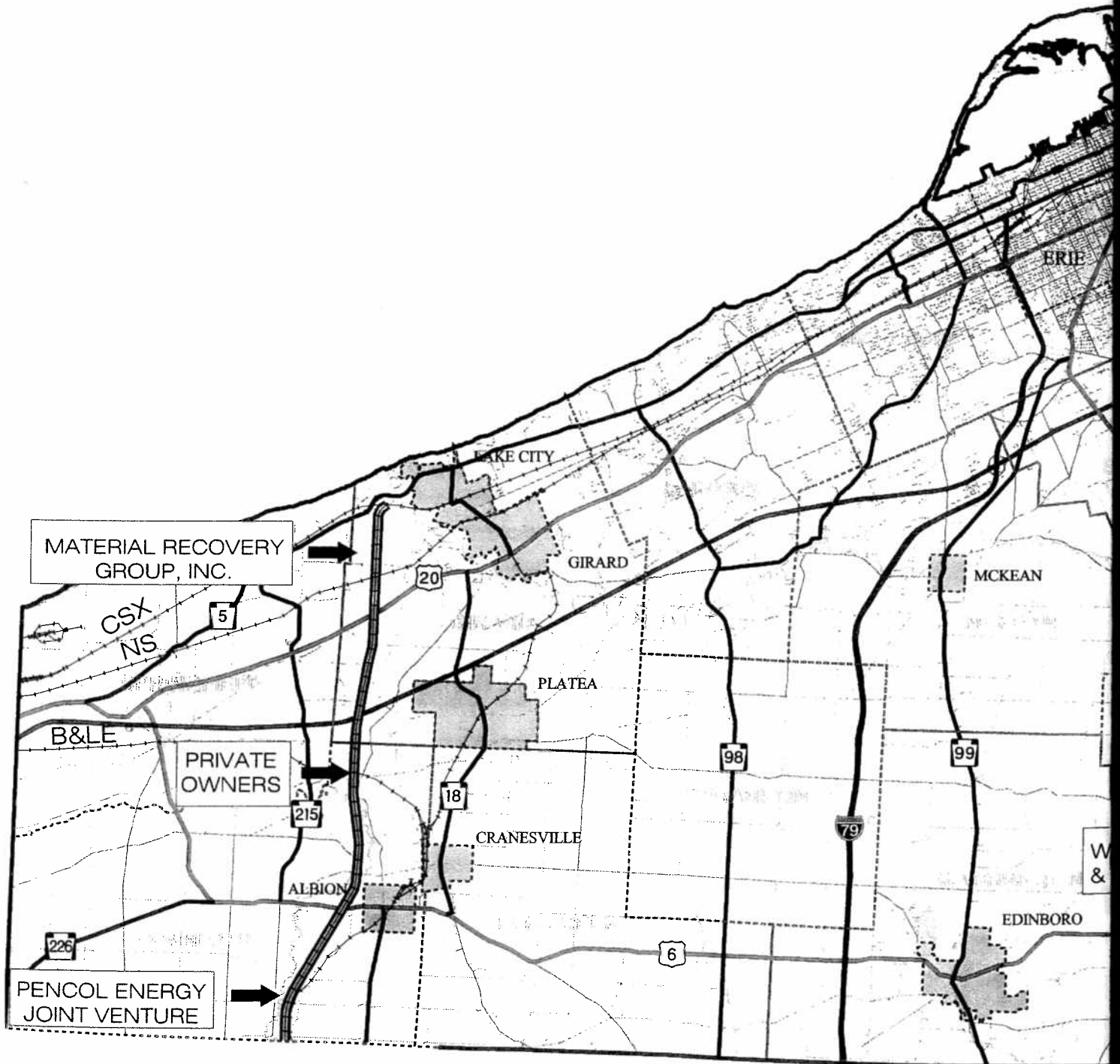
Date

739301





ERIE COUNTY RAIL TRAIL FEASIBILITY STUDY POTENTIAL RAIL TRAIL CORRIDORS



SERVICE DATE

JAN 8 1990

INTERSTATE COMMERCE COMMISSION

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB-88 (Sub-No. 5X)

BESSEMER AND LAKE ERIE RAILROAD COMPANY--ABANDONMENT EXEMPTION--
IN ERIE COUNTY, PA

Decided: January 3, 1990

Bessemer and Lake Erie Railroad Company (BLE) filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon its 5.73-mile line of railroad between Survey Station 308+85, at or near Lexington, and a point near Survey Station 6+00, about 1.5 miles west of Lake City, Erie County, PA. A notice of exemption was served and published in the Federal Register on December 5, 1989 (54 FR 50284). The exemption is scheduled to become effective January 4, 1990.

The Commission's Section of Energy and Environment issued an environmental assessment indicating that the right-of-way may be suitable for other public use following abandonment. On December 21, 1989, Material Recovery of Erie, Inc. (MR), filed a request for issuance of a notice of interim trail use (NITU) and for a public use condition, so that it may negotiate with BLE for use of the line as a recreational trail adjoining Elk Creek. BLE is willing to negotiate for interim trail use.

In light of BLE's willingness to enter into negotiations, I will issue a NITU under 49 CFR 1152.29. The parties may negotiate an agreement during the 180-day period prescribed below. If no agreement is reached within 180 days, BLE may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As an alternative to interim trail use under the National Trails System Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10906. When the need for both conditions is proven, it is Commission policy to impose them concurrently, subject to the limitation that the public use condition expire upon execution of a trail use agreement. See Rail Abandonments--Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). To justify a public use condition a party must show: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for imposition of the time period. See 49 CFR 1152.28(a)(2). MR has satisfied these requirements and, therefore, a 180-day public use condition will be imposed.

As conditioned, this action will not significantly affect either the quality of the human environment or conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. The notice of exemption is modified to provide for: (1) the directives for implementing interim trail use/rail banking as set forth below; and (2) the condition that BLE leave intact the right-of-way underlying the track, including bridges, culverts, and similar structures (but not track or track materials) for a period of 180 days from the service date of this decision so that any interested person may negotiate the acquisition of the line for public use. If this public use condition is still in effect

EXHIBIT

2

when a final trail use agreement is reached, then it is modified to expire upon the execution of a final trail use agreement.

3. BLE may discontinue service, cancel tariffs for this line on not less than 10-days' notice to the Commission, and salvage track material consistent with interim trail use/rail banking after the effective date of this decision and notice. Tariff cancellations must refer to this decision and notice by date and docket number.

4. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, and legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and the payment of any taxes that may be levied or assessed against the right-of-way.

5. Interim trail use/rail banking is subject to the future restoration of rail service.

6. If the user intends to terminate trail use, it must send the Commission a copy of this decision and notice and request that it be vacated on a specified date.

7. If an agreement for interim trail use/rail banking is reached by the 180th day after the service date of this decision, interim trail use may be implemented. If no agreement is reached by then, BLE may fully abandon the line.

8. This decision is effective on its service date.

By the Commission, Joseph R. Dettmar, Acting Director,
Office of Proceedings.

(SEAL)

Noreta R. McGee
Secretary

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE : BANKRUPTCY NO. 94-10812
: CHAPTER 11
MATERIAL RECOVERY OF ERIE, INC. :
DEBTOR :

MEMORANDUM

Before the Court for approval is the Debtor's DISCLOSURE STATEMENT TO ACCOMPANY AMENDED PLAN DATED SEPTEMBER 29, 1999 (the "Disclosure Statement"). As part of the Amended Plan, Debtor proposes to convey an easement to certain property (the "Property") to Pennsylvania Electric Co. a/k/a GPU Energy ("GPU") and to use the proceeds of that sale to fund the Amended Plan.

The Debtor filed a Motion for Approval of the Sale of the Property to GPU and a hearing to consider approval of the sale was held on February 12, 1996 ("Sale Hearing"). George Cass, Esq. ("Cass") of the Buchanan Ingersoll, P.C. law firm, appeared at the Sale Hearing on behalf of Andrew Hazer, Jr. and Alice Hazer, Robert D. Stearns and Rae E. Stearns, George Hazer, John P. Hannah and Virginia E. Hannah, Vincent J. Bartosek, Victor J. Wheeler and Sandra J. Wheeler, James K. Sisson and Nancy A. Sisson, and Charles Dombrowski and Jean Dombrowski (the "Adjacent Landowners"). The Adjacent Landowners did not object to the sale, but Cass read a Notice to Prospective Bidders on behalf of the Adjacent Landowners in which the Adjacent Landowners asserted "that the purchaser of the [Property] will not receive any right, title or interest in that portion of the alleged right-of-way or other property which abuts or traverses

EXHIBIT

3

the land which the abutting property owners own in fee simple." By Order dated February 16, 1996 (the "Sale Order"), the sale of the Property was approved. There was no appeal from the Sale Order and it is a final order. The sale was authorized free and divested of specific liens, none of which pertained to the Adjacent Landowners. A clause was added to the Sale Order for the protection of the Adjacent Landowners, which stated: "This Order is not an adjudication of title to the real estate being sold." The Debtor was authorized to sell and transfer to GPU, any and all ownership rights which the Debtor had.

GPU had some concern about what rights it was buying and the Debtor and GPU jointly requested an extension of time to consummate the sale until the issues could be resolved. Additional proceedings were conducted before the Surface Transportation Board which rendered a Decision on May 21, 1997.¹ Once the Decision was issued, GPU was sufficiently satisfied that it was willing to proceed with the purchase of the Property. Rather than purchase the Property in fee simple as originally contemplated, the Debtor and GPU have agreed via the Amended Plan to transfer an easement to GPU for the same price. We find that the transfer of an easement, or less than the entire fee interest as allowed in the Sale Order, at the same price, is immaterial and that the transfer of the easement is authorized under the Sale Order. Again, the Sale Order makes no determination of the

1. We do not know the extent to which the Adjacent Landowners and/or its counsel participated in the Surface Transportation Board proceeding, although we have been informed by letters from the Landowners that they were represented by the law firm of Buchanan Ingersoll P.C.

validity or extent of Debtor's title in the Property upon which GPU is purchasing as an easement. If the Debtor owns the fee, then it may properly convey an easement.

The Adjacent Landowners have filed objections to the Disclosure Statement. They assert that they have ownership rights in the Property and that this Court should determine those rights which would, in turn, prohibit the transfer of any interest of the Debtor.

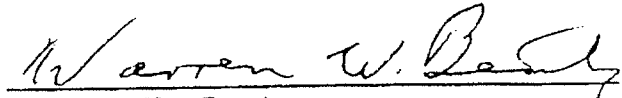
If the Adjacent Landowners have an interest in the property upon which the Debtor is conveying an easement, then that interest is not impaired by the Sale Order nor by the Plan of Reorganization.

The Adjacent Landowners may have some rights in the property or they may have lost all rights or they may have reversionary rights or rights of re-entry for a condition broken which may ripen at some future date. The property may be "rail banked" under federal law so as to postpone the rights of the Adjacent Landowners, if any, to a future time. We make no determination as to those rights. Our Order simply authorized the Debtor to sell all or a part of its interest in the land. That Order became final long ago.

We find that the Disclosure Statement adequately informs creditors of the Debtor's intentions. If the Adjacent Landowners have rights which have not been adjudicated by the Surface Transportation Board, those rights remain in effect and are not eradicated by the Debtor's Disclosure Statement and Amended Plan and can be pursued in a non-bankruptcy forum.

The Disclosure Statement will be approved by separate Order. The Debtor is directed to make the necessary modifications to the Disclosure Statement to address the amounts due to taxing bodies before mailing. A hearing on confirmation of the Debtor's Amended Plan of Reorganization has been fixed for 11:15 a.m., Friday, January 7, 2000, in the Bankruptcy Courtroom, 717 State Street, 7th Floor, Erie, Pennsylvania. (The time previously set aside for December 21, 1999 is abandoned.)

NOVEMBER 30, 1999


Warren W. Bentz
United States Bankruptcy Judge

c: William T. Morton, Esq.
Lawrence C. Bolla, Esq.
Thomas M. Lent, Esq.
U.S. Trustee

SERVICE DATE - MAY 28, 1997

SURFACE TRANSPORTATION BOARD¹

DECISION

Docket No. AB-88 (Sub-No. 5X)

BESSEMER & LAKE ERIE RAILROAD COMPANY--ABANDONMENT
EXEMPTION--IN ERIE COUNTY, PA

Decided: May 21, 1997

By petition filed on March 3, 1997, Material Recovery of Erie, Inc. (petitioner) seeks to reopen this proceeding for clarification of its compliance with a notice of interim trail use or abandonment (NITU) that was issued by the former ICC on January 8, 1990. The clarification became necessary when petitioner sought to convey the railroad right-of-way it purchased from the Bessemer & Lake Erie Railroad pursuant to the NITU to the Pennsylvania Electric Company (PEC) as part of the liquidation of its estate in a proceeding before the United States Bankruptcy Court, Bankruptcy No. 94-10812-WWB. Adjacent landowners have come forward in the bankruptcy proceeding asserting that their reversionary interests in the right-of-way have vested. We are authorized by 5 U.S.C. 554 to issue declaratory orders to eliminate controversy and we will do so here.

BACKGROUND

Bessemer and Lake Erie Railroad Company (BLE) filed a notice of exemption under 49 CFR 1152 Subpart F--*Exempt Abandonments* to abandon its 5.73-mile line of railroad between Survey Station 308+85, at or near Lexington, and a point near Survey Station 6+00, about 1.5 miles west of Lake City, Erie County, PA. A notice of exemption was served and published in the *Federal Register* on December 5, 1989 (54 FR 50284). The exemption was scheduled to become effective on January 4, 1990.

The December 5 exemption notice provided for the filing of trail use/rail banking requests by December 15, 1989, and public use requests by December 26, 1989. On December 21, 1989, petitioner filed a request for issuance of a notice of interim trail use and for a public use condition. Petitioner satisfied the requirements of 49 CFR 1152.29 by submitting a statement of willingness to assume financial responsibility and by acknowledging that use of the right-of-way is subject to possible future restoration for rail service. Petitioner also satisfied the requirements under 49 CFR 1152.28(a)(2) for imposing a public use condition. Because B&LE indicated its willingness to enter into negotiations with petitioner, a NITU was issued providing directives for implementing interim trail use/rail banking and imposing a public use condition.

Petitioner notes that most acquisitions for trail use are entered into after a NITU is issued. Here, B&LE entered into an agreement of sale on August 14, 1989, and the property was conveyed to petitioner by quit claim deed on December 20, 1989. Petitioner points out that the sale agreement contained provisions making the sale of the right-of-way contingent upon ICC abandonment approval and third party offers to purchase the right-of-way for continued rail service. Petitioner

¹ The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 10903 and 16 U.S.C. 1247(d). Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute, unless otherwise indicated.

EXHIBIT

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contents that the written exchange--its request for NITU on December 12, 1989, and B&L E's consent on January 3, 1990--effectively modified the terms of the sale agreement. We agree. Transfer of the property could not have legally occurred prior to January 4, 1990 (the effective date of the abandonment exemption). Here, a NITU was imposed before B&L E was authorized to effect abandonment, thus preserving the agency's jurisdiction over the right-of-way. Based on the evidence presented, we conclude that the property has not reverted to adjacent landowners. This is only an advisory opinion because the subject property is now under the jurisdiction of the bankruptcy court, which is responsible for a final determination of legal ownership.

Although the right-of-way is subject to liquidation as an asset of petitioner's estate in the bankruptcy proceeding, petitioner states that any agreement of sale between PEC and itself would require the continued preservation of the right-of-way for recreational use by the public or for reconversion to rail use. We agree. Thus, if the court permits the sale of the right-of-way to PEC, then, to ensure continued rail banked status of the right-of-way, petitioner and PEC must comply with 49 CFR 1152.29(f) which says:

(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

(i) A copy of the extant CITU or NITU; and

(ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.

It is ordered:

1. This proceeding is reopened and clarified.
2. The 5.73-mile line of railroad between Survey Station 308+85, at or near Lexington, and a point near Survey Station 6+00, about 1.5 miles west of Lake City, Erie County, PA, is rail banked pursuant to 16 U.S.C. 1247(d).
3. This decision is effective on May 28, 1997.

4. A copy of this decision will be mailed to:
United States Bankruptcy Court
for the Western District of Pennsylvania
1602 Federal Building
1000 Liberty Avenue
Pittsburgh, PA 15222

Re: No. 94-10812

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

EASEMENT

*Jay will grant
CPS for leased Doc*

INDENTURE, made this 17th day of February, 49200, by and between
MATERIAL RECOVERY OF ERIE, INC., a Pennsylvania corporation, hereinafter called "Grantor",

and

PENNSYLVANIA ELECTRIC COMPANY, also a Pennsylvania corporation, d/b/a GPU Energy,
hereinafter called "Grantee",

WITNESSETH, Grantor, intending to be legally bound and in consideration of the additional sum hereinafter set forth, hereby grant, specially warrant and convey to Grantee, its successors and assigns, the permanent easement and uninterrupted right from time to time to place, erect, construct, install, use, operate, patrol, inspect, maintain, repair, reconstruct, renew, add to, relocate and remove, at will, facilities, including poles, pole structures, supporting structures, towers, crossarms, underground and overhead wires, pipelines, ducts, conduits, cables, anchors, guys, lightning protective wires, attachments, equipment and appurtenances for the transmission and distribution of electricity and gas or liquid products, and the operation of communication systems on, over, under and across all those certain parcels of Grantor's lands, situate in the Townships of Girard and Conneaut, County of Erie, and Commonwealth of Pennsylvania, being more particularly described in the legal description dated March 28, 1996, amended April 8, 1996, prepared by William J. Mechlenburg, Jr., P.L.S., David James Laird Associates, marked Exhibit "A", attached hereto and made a part hereof. Said easement is also identified in the Erie County Assessment Office as Tax Index Parcels: (24) 7-22-19; (24) 7-25-6; (24) 8-63-22; (24) 8-62-11; (24) 20-67-24; (24) 20-68-12; (24) 21-72-3; (24) 21-72-4, and (4) 5-10-11, as more fully described in Record Book 119, page 129, recorded in Erie County Records.

Together with the right from time to time to install on said lines such additional apparatus and equipment as Grantee may deem necessary and the right to remove said lines or any part thereof.

Together with the right from time to time to clear and entirely remove everything, including buildings, from said parcels of land and also from time to time the right to trim, cut or remove trees that may, in the judgment of Grantee, interfere with or endanger the aforesaid facilities; together also with the right of access over Grantor's parcels of land; including the right to use and improve such existing driveways and roads for the above purposes and as may be necessary or convenient for the use and benefit of Grantee, its successors and assigns, to access presently existing adjacent lands, adjacent facilities, and as the same may be established from time to time by subdivision; together also with the right from time to time to construct, reconstruct, improve, maintain, relocate and use such additional roads on said parcels at locations as Grantee may deem necessary.

Grantor does hereby covenant and agree that it will not erect or permit the erection of any building or structure, change the grade, or otherwise limit, interfere with or obstruct Grantee's access to said parcels or exercise of the rights hereby granted.

EXHIBIT

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Grantor and Grantee hereby covenant and agree that each will take no actions contrary to the preservation of the "interim trail status" of the property pursuant to the National Trail Systems Act, and Grantor will include in any deed conveying all or any part of the property a perpetual restriction and covenant requiring its successors and assigns to similarly maintain such status.

Grantee does hereby covenant and agree that it will pay any and all real estate taxes assessed against the easement property as the result of the erection thereon of any structures or improvements by the Grantee.

At such time Grantor's title to said premises is determined, to satisfaction of Grantee, to be marketable and free and clear of all liens and encumbrances or the same have been satisfied or subordinated hereto, Grantee shall pay, and Grantor shall accept, the additional sum of One Hundred Ten Thousand Dollars (\$110,000) payable in accordance with the terms of Agreement for the Sale of Real Estate, dated November 13, 1995, and amended by Addendum to Agreement for the Sale of Real Estate, dated September 21, 1998, heretofore executed by the parties hereto. If the said sum is not paid or tendered within the time specified, the rights and privileges herein granted shall, without further act by the parties hereto, cease and determine, and thereupon Grantee shall be relieved from any further obligation hereunder.

The rights granted hereby may be assigned in whole or in part and the words "Grantor" and "Grantee" shall include their heirs, executors, administrators, successors, assigns, lessees and licensees, as the case may be. This Indenture contains the entire agreement between the parties.

IN WITNESS WHEREOF, Grantor has duly executed this Indenture the day and year first above written.

Attest:

MA L Sec
Secretary

MATERIAL RECOVERY OF ERIE, INC.

By MA L Pres.
President

(Affix Seal)

Received this 17th day of February, 2000, of the above-named Grantee the additional sum above mentioned in full.

Attest:

MA L Pres.
Secretary

MATERIAL RECOVERY OF ERIE, INC.

By MA L Pres.
President

(Affix Seal)

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COMMONWEALTH OF PENNSYLVANIA :

: ss

COUNTY OF

On this, the 17th day of February, 192000, before me, a Notary Public, the undersigned officer, personally appeared _____, who acknowledged himself to be the President of Material Recovery of Erie, Inc., a Pennsylvania corporation, and that he as such President, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by himself as President.

In Witness Whereof, I hereunto set my hand and official seal.

S/

Notary Public

EXHIBIT

LEGAL DESCRIPTION - 62.594 ACRE PARCEL

PENNSYLVANIA ELECTRIC COMPANY

March 28, 1996
Amended April 8, 1996

ALL THAT CERTAIN PIECE OR PARCEL OF LAND situated in the Townships of Conneaut and Girard and being more particularly bounded and described as follows to-wit;

BEGINNING at the northeasterly corner of the piece at a rebar survey point, said point being located at the intersection of the southerly line of lands of Conrail and the northwesterly line of lands of the Fairview Evergreen Nurseries, said point of beginning also being located 230 feet (more or less) south of and at right angles to, the centerline of West Lake Road, PA Route 5 (50 foot right of Way), said point of beginning also being located at a place now or formerly know as the Girard Junction Station.

THENCE South 82 Degrees, 01 Minutes, 19 Seconds West, along said northwesterly line of lands of the Fairview Evergreen Nurseries, a distance of 32.14 feet to a point of curve;

THENCE southwestwardly, continuing along a northwesterly line of lands of the Fairview Evergreen Nurseries, and along a curve to the left having a radius of 1272.20 feet, a delta angle of 35 degrees, 24 minutes, 34 seconds, an arc length of 786.23 feet to a rebar survey point and a point of compound curve;

THENCE southwestwardly, along a westerly line of lands of the Fairview Evergreen Nurseries, and along a curve to the left having a radius of 1217.07 feet, a delta angle of 27 degrees, 30 minutes 40 seconds, an arc length of 584.39 feet to a rebar survey point and a point of compound curve;

THENCE southwardly, continuing along a westerly line of lands of the Fairview Evergreen Nurseries, and along a curve to the left having a radius of 1279.78 feet, a delta angle of 18 degrees, 20 minutes, 30 seconds, an arc length of 409.69 feet to a rebar survey point;

THENCE South 00 Degrees, 02 Minutes, 10 Seconds West, continuing along a westerly line of lands of the Fairview Evergreen Nurseries, a distance of 495.72 feet to a rebar survey point;

THENCE South 00 Degrees, 02 Minutes, 11 Seconds East, continuing along a westerly line of lands of the Fairview Evergreen Nurseries, a distance of 1582.00 feet to a rebar survey point;

THENCE South 00 Degrees, 02 Minutes, 10 Seconds West, continuing along a westerly line of lands of the Fairview Evergreen Nurseries and along the westerly line of lands of now or formerly of Robert W. and Tina M. Harpst, a distance of 1554.03 feet to a rebar survey point;

THENCE South 89 Degrees 57 Minutes, 50 Seconds East, along the southerly line of lands of said Harpst a distance of 6.25 feet to a rebar survey point;

THENCE South 00 Degrees, 02 Minutes, 10 Seconds West, along the westerly line of lands now or formerly of Lawrence R. and Beverly Frey, a distance of 1614.60 feet to a rebar survey point;

THENCE North 89 Degrees, 57 Minutes, 50 Seconds West, continuing along the lands of said Frey, a distance of 7.25 feet to a rebar survey point;

THENCE South 00 Degrees, 02 Minutes, 10 Seconds West, along a westerly line of lands of said Frey, and along the westerly line of lands now or formerly of Milton G. Campbell and Holliday Crooked Creek Farm, Inc., passing over a rebar survey point in the northerly and southerly lines of West Middle Road (50 foot right-of-Way) at distances of 167.51 feet and 217.51 feet and passing over rebar survey points in the northerly and southerly lines of the New York, Chicago and St. Louis Railroad at distances of 1408.91 feet and 1472.29 feet, a total distance of 3788.05 feet to a point;

THENCE North 61 Degrees, 47 Minutes, 10 Seconds East, continuing along the lands of said Holliday Crooked Creek Farm, Inc., a distance of 1.14 feet to a rebar survey point;

THENCE South 00 Degrees, 02 Minutes, 10 Seconds West, along a westerly line of lands of said Holliday Crooked Creek Farm, Inc., and along the westerly line of lands now or formerly of John C. and Bertha E. Edwards, passing over a rebar survey point in the northerly line of U.S. Route 20 (120 foot right-of-Way) at a distance of 1846.99 feet a total distance of 1915.91 feet to a point in the centerline of said U.S. Route 20;

THENCE South 60 Degrees, 33 Minutes, 40 Seconds West, along said centerline of U.S. Route 20, a distance of 9.19 feet to a point;

THENCE South 00 Degrees, 02 Minutes, 10 Seconds West, along the westerly line of lands now or formerly of Material Recovery of Erie, Inc., along the westerly line of lands now or formerly of Joseph E. Pustelak, et al, and along the westerly line of lands now or formerly of George W. Iv and Cindy A. Allen, a distance of 2959.75 feet to a rebar survey point;

THENCE South 89 Degrees, 57 Minutes, 50 Seconds East, along the southerly line of said lands of Iv and Allen, a distance of 50.00 feet to a rebar survey point;

THENCE South 00 Degrees, 02 Minutes, 10 Seconds West, along the westerly line of lands now or formerly of Charles B. and Jean Mathews, a distance of 229.86 feet to a rebar survey point and a point of curvature;

THENCE continuing along the westerly line of lands of said Mathews and along a curve to the right, having a radius of 4786.24 feet, a delta angle of 2 Degrees, 02 Minutes, 40 Seconds, and a arc length of 170.79 feet to a rebar survey point in the northerly line of Cross Station Road (50 foot Right-of-Way).

THENCE North 89 Degrees, 15 Minutes, 15 Seconds West, along the northerly line of said Cross Station Road, a distance of 50.01 feet to a rebar survey point;

THENCE southwardly along the westerly line of lands now or formerly of Robert D. and Rae Stearns and along a westerly line of lands now or formerly of John P. Hannah, along a curve to the right having a radius of 4736.24 feet, passing over a rebar survey point in the southerly line of said Cross Station Road at a arc length of 50.02 feet, said curve having a total delta angle of 7 Degrees, 40 Minutes, 29 Seconds and a total arc length of 634.42 feet to a rebar survey point;

THENCE South 09 Degrees, 46 Minutes, 10 Seconds West, continuing along a westerly line of lands of said Hannah, distance of 66.00 feet to a rebar survey point;

THENCE South 13 Degrees, 03 Minutes, 51 Seconds East, continuing along a westerly line of lands of said Hannah, a distance of 226.77 feet to a rebar survey point;

THENCE South 09 Degrees, 46 Minutes, 10 Seconds West, continuing along a westerly line of lands of said Hannah, a distance of 425.00 feet to a rebar survey point;

THENCE South 28 Degrees, 07 Minutes, 42 Seconds West, continuing along a westerly line of lands of said Hannah, a distance of 238.12 feet to a rebar survey point;

THENCE South 09 Degrees, 46 Minutes, 10 Seconds West, continuing along a westerly line of lands of said Hannah, a distance of 304.00 feet to a rebar survey point;

THENCE South 11 Degrees, 01 Minutes, 18 Seconds West, along the westerly line of lands now or formerly of Charles W. Dombrowski a distance of 196.68 feet to a rebar survey point;

THENCE southwardly, continuing along a westerly line of lands of said Dombrowski, and along a curve to the left having a radius of 11,425.48 feet, a delta angle of 1 Degrees, 01 Minutes, 30 Seconds, an arc length of 204.40 feet to a rebar survey point;

THENCE South 07 Degrees, 45 Minutes, 26 Seconds West, continuing along a westerly line of lands of said Dombrowski, a distance of 207.83 feet to a rebar survey point;

THENCE South 05 Degrees, 33 Minutes, 35 Seconds West, continuing along a westerly line of lands of said Dombrowski and along the westerly line of lands now or formerly of James K. and Nancy Sisson, passing over a rebar survey point in the northerly line of Springfield Road (50 foot Right-of Way) at a distance of 981.78 feet, a total distance of 1015.83 feet to a point in the centerline of said Springfield Road;

THENCE South 10 Degrees, 09 Minutes, 43 Seconds West, along the westerly line of lands now or formerly of Vincent J. Bartosek, a distance of 31.79 feet to a rebar survey point in the southerly line of said Springfield Road;

THENCE South 09 Degrees, 51 Minutes, 23 Seconds West, continuing along the westerly line of lands of said Bartosek and along the westerly line of lands now or formerly of John and Ruth Olesnanik and the westerly line of lands now or formerly of William and Dorothy Weyeneth, a distance of 946.21 feet to a rebar survey point;

THENCE South 08 Degrees, 06 Minutes, 08 Seconds West, continuing along the westerly line of lands of said Weyeneth, and along the westerly line of lands now or formerly of James V. Jordano, Jr., et ux, a distance of 498.78 feet to a rebar survey point;

THENCE South 07 Degrees, 45 Minutes, 30 Seconds West, continuing along the westerly line of lands of said Jordano and along the westerly line of lands now or formerly of Geraldine F. Taylor and along the westerly line of lands now or formerly of Patrick J. and C. L. Bongiorno, a distance of 638.08 feet to point;

THENCE South 89 Degrees, 37 Minutes, 33 Seconds East, continuing along the lands of said Bongiorno, a distance of 1.01 feet to a rebar survey point;

THENCE South 07 Degrees, 45 Minutes, 30 Seconds West, continuing along a westerly line of lands of said Bongiorno, and along the westerly line of lands now or formerly of Bruce D. Redfield III, et ux, along the westerly line of lands now or formerly of Charles A. Vorse III, along the westerly line of lands now or formerly of Clinton E. and Ruth M. Weaver, along the westerly line of lands now or formerly of Michael J. Gresh and along the westerly line of lands now or formerly of George Hazer, passing over a rebar survey point in the northerly line of Neiger Road (50 foot Right-of-Way) at a distance of 1470.66 feet, passing over iron pipes at a distances of 1532.16 feet and 1895.58 feet, passing over a rebar survey point in the northerly and southerly lines of Interstate Route 90 at distances of 2362.85 feet and 2575.08 feet, a total distance of 4198.31 feet to a rebar survey point;

THENCE southwardly, continuing along the westerly line of lands of said Hazer and along a curve to the left having a radius of 5694.58 feet, a delta angle of 5 Degrees, 45 Minutes, 03 Seconds, and an arc length of 571.57 feet to a rebar survey point;

THENCE South 02 Degrees, 00 Minutes, 16 Seconds East, continuing along the westerly line of lands of said Hazer and along the westerly line of lands now or formerly of Victor John and S. J. Wheeler, a distance of 222.19 feet to a rebar survey point;

THENCE South 02 Degrees, 12 Minutes, 28 Seconds East, continuing along the westerly line of lands of said Wheeler, a distance of 311.84 feet to a rebar survey point;

THENCE South 01 Degrees, 05 Minutes, 50 Seconds West, continuing along the westerly line of lands of said Wheeler, and along the westerly line of lands now or formerly of Andrew Hazer, Jr., et ux, a distance of 735.13 feet to a rebar survey point;

THENCE South 00 Degrees, 08 Minutes, 48 Seconds West, continuing along the westerly line of lands of said Andrew Hazer, Jr., et ux, and along the westerly line of lands now or formerly of Richard and Mary M. Gloskey, a distance of 920.00 feet to a rebar survey point;

THENCE South 00 Degrees, 30 Minutes, 28 Seconds East, continuing along the westerly line of lands of said Gloskey, and along a westerly line of lands now or formerly of the Pennsylvania Electric Company, a distance of 1215.77 feet to a rebar survey point;

THENCE North 83 Degrees, 08 Minutes, 08 Seconds East, continuing along the lands of said Pennsylvania Electric Company, a distance of 25.17 feet to a rebar survey point;

THENCE South 00 Degrees, 05 Minutes, 26 Seconds West, along a westerly line of lands of said Pennsylvania Electric Company and along the westerly line of lands now or formerly of the Bessemer and Lake Erie Railroad, a distance of 547.24 feet to a rebar survey point in the northerly line of other lands of the Bessemer and Lake Erie Railroad;

THENCE South 89 Degrees, 45 Minutes, 21 Seconds West, along the northerly line of lands of said Bessemer and Lake Erie Railroad, a distance of 134.00 feet to a rebar survey point;

THENCE North 00 Degrees, 13 Minutes, 39 Seconds West, along an easterly line of lands now or formerly of the Pennsylvania Electric Company, a distance of 531.33 feet to a rebar survey point;

THENCE North 83 Degrees, 08 Minutes, 08 Seconds East, continuing along the lands of said Pennsylvania Electric Company, a distance of 25.18 feet to a rebar survey point;

THENCE North 00 Degrees, 07 Minutes, 50 Seconds West, along an easterly line of lands of said Pennsylvania Electric Company, a distance of 1226.21 feet to a rebar survey point;

THENCE North 00 Degrees, 28 Minutes, 34 Seconds West, continuing along an easterly line of lands now or formerly of the Pennsylvania Electric Company and along the easterly line of lands now or formerly of Andrew Hazer, Jr., et ux, a distance of 920.03 feet to a rebar survey point;

THENCE North 00 Degrees, 10 Minutes, 39 Seconds West, continuing along the easterly line of lands of said Andrew Hazer, Jr., et ux, and along the easterly line of lands now or formerly of Victor John and S. J. Wheeler, a distance of 1034.94 feet to a rebar survey point;

THENCE northwardly, along the easterly line of lands of said Wheeler and along the easterly line of lands now or formerly of George Hazer and along a curve to the right having a radius of 6052.97 feet, having a delta angle of 7 Degrees, 43 Minutes, 37 Seconds, an arc length of 816.29 feet to a rebar survey point,

THENCE North 07 Degrees, 47 Minutes, 26 Seconds East, along the easterly line of lands of said Hazer, and along the easterly line of lands now or formerly of the Pennsylvania Electric Company, passing over a rebar survey point in the southerly line of Interstate Route 90 at a distance of 1569.91, a total distance of 1782.22 feet to a iron survey point in the northerly line of said Interstate Route 90;

THENCE North 07 Degrees, 45 Minutes, 30 Seconds East, along the easterly line of lands now or formerly of Clinton E. and Ruth M. Weaver, along the easterly line of lands of the Pennsylvania Electric Company (lands formerly of Michael and Mary Gresh and lands formerly of Manville W. Keith), passing over iron survey points at distances of 554.23 feet and 632.39 feet and passing over a rebar survey point in the southerly line of Nieger Road (50 foot Right-of-Way) at a distance of 938.70 feet, a total distance of 968.94 feet to point in the centerline of said Neiger Road;

THENCE North 48 Degrees, 00 Minutes, 30 Seconds West, along said centerline of Neiger Road, a distance of 2.42 feet to a point;

THENCE North 07 Degrees, 45 Minutes, 30 Seconds East, along the easterly line of lands of the Pennsylvania Electric Company (lands formerly of W. W. and Leona Vogt and E. E. and Cecilia Schneider, lands formerly of David and Patricia Shaffer, lands formerly of Alfons and Sophie Wozniak, lands formerly of William and Dorothy Weyeneth and lands formerly of John M. Olesnanik), passing over a rebar survey point at a distance of 1435.29 feet and passing over iron survey points at distances of 2083.74 feet and 2448.96 feet, a total distance of 2489.93 feet to a rebar survey point;

THENCE North 06 Degrees, 16 Minutes, 25 Seconds East, along the easterly line of the Pennsylvania Electric Company (lands formerly of John M. Olesnanik), a distance of 630.30 feet to an iron survey point;

THENCE North 06 Degrees, 17 Minutes, 19 Seconds East, along the easterly line of lands of the Pennsylvania Electric Company (lands formerly of said Olesnanik), passing over a rebar survey point in the southerly line of Springfield Road (50 foot Right-of-Way) at a distance of 534.63 feet, a total distance of 568.29 feet to a point in the centerline of said Springfield Road;

THENCE North 09 Degrees, 45 Minutes, 22 Seconds East, along the easterly line of lands of the Pennsylvania Electric Company (lands formerly of Carl Dombrowski and Charles Dombrowski), passing over a rebar survey point in the northerly line of said Springfield Road at a distance of 31.97 feet a total distance of 887.35 feet to a rebar survey point;

THENCE North 07 Degrees, 45 Minutes, 30 Seconds East, continuing along the easterly line of lands of the Pennsylvania Electric Company (lands formerly of said Dombrowski), a distance of 252.56 feet to a rebar survey point;

THENCE North 08 Degrees, 32 Minutes, 00 Seconds East, continuing along the easterly line of lands of the Pennsylvania Electric Company (lands formerly of said Dombrowski), a distance of 309.98 feet to a rebar survey point;

THENCE North 09 Degrees, 54 Minutes, 57 Seconds East, continuing along the easterly line of lands now or formerly of Joseph & Barbara Mozdy, a distance of 452.16 feet to a rebar survey point;

THENCE North 09 Degrees, 32 Minutes, 01 Seconds West, continuing along the easterly line of lands of said Mozdy, a distance of 208.73 feet to a rebar survey point;

THENCE North 09 Degrees, 09 Minutes, 42 Seconds East, continuing along the easterly line of lands of said Mozdy, a distance of 377.02 feet to a rebar survey point;

THENCE North 35 Degrees, 54 Minutes, 40 Seconds East, continuing along the easterly line of lands of said Mozdy, a distance of 181.57 feet to a rebar survey point;

THENCE North 09 Degrees, 46 Minutes, 10 Seconds East, continuing along the easterly line of lands of said Mozdy, a distance of 90.00 feet to a rebar survey point;

THENCE northwardly, continuing along the easterly line of lands of said Mozdy and along a curve to the left having a radius of 4670.24 feet, passing over a rebar survey point in the southerly line of Cross Station Road (50 foot Right-of-Way) at a arc length of 574.01', said curve having a total delta angle of 7 Degrees, 20 Minutes, 56 Seconds, a total arc length of 599.02 feet to a point in the centerline of said Cross Station Road;

THENCE South 89 Degrees, 15 Minutes, 15 Seconds East, along said centerline of Cross Station Road a distance of 0.77 feet to a point;

THENCE North 01 Degrees, 17 Minutes, 48 Seconds East, along an easterly line of lands the Pennsylvania Electric Company (lands formerly of the Estate of Augustine Mandarino), passing over a rebar survey point in the northerly line of said Cross Station Road at a distance of 25.00 feet, a total distance of 194.36 feet to a rebar survey point;

THENCE North 00 Degrees, 02 Minutes, 10 Seconds East, continuing along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of said Estate of Augustine Mandarino), passing over a rebar survey point in the southerly line of U.S. Route 20 (120 foot Right-of-Way) at a distance of 3083.95 feet, a total distance of 3152.87 feet to a point in the centerline of said U.S. Route 20;

THENCE North 60 Degrees, 33 Minutes, 39 Seconds East, along the said centerline of U.S. Route 20, a distance of 1.16 feet to a point;

THENCE North 00 Degrees, 02 Minutes, 10 Seconds East, along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of the John Stewart, et ux), passing over a rebar survey point in the northerly line of said U.S. Route 20, at a distance of 68.92 feet, a total distance of 185.61 feet to a rebar survey point;

THENCE North 62 Degrees, 13 Minutes, 50 Seconds West, continuing along the lands of the Pennsylvania Electric Company (lands formerly of said Stewart), a distance of 10.17 feet to a rebar survey point;

THENCE North 00 Degrees, 02 Minutes, 10 Seconds East, along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of said Stewart and lands formerly of George Holliday), passing over a iron survey point at a distance of 1704.40 feet, a total distance of 3562.39 feet to a rebar survey point;

THENCE North 89 Degrees, 57 Minutes, 50 Seconds West, along a easterly line of lands of the Pennsylvania Electric Company (lands formerly of said Holliday), a distance of 4.00 feet to a rebar survey point;

THENCE North 00 Degrees, 02 Minutes, 10 Seconds East, along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of said Holliday), passing over rebar survey points in the southerly and northerly lines of the New York, Chicago and St. Louis Railroad at distances of 490.48 feet and 553.86 feet, passing over a rebar survey point at a distance of 1033.20 feet and passing over a rebar survey point in the southerly line of West Middle Road (50 foot Right-of-Way) at a distance of 1774.04 feet, a total distance of 1799.04 feet to a point in the centerline of said Middle Road;

THENCE North 89 Degrees, 59 Minutes, 38 Seconds East, along the centerline of said West Middle Road, a distance of 2.50 feet to a point;

THENCE North 00 Degrees, 02 Minutes, 10 Seconds East, along an easterly line of lands the Pennsylvania Electric Company (lands formerly of Donald J. Frey, et ux), passing over a rebar survey point in the northerly line of said West Middle Road, at a distance of 25.00 feet, a total distance of 192.34 feet to a iron survey point;

THENCE North 89 Degrees, 57 Minutes, 50 Seconds West, continuing along the lands of the Pennsylvania Electric Company (lands formerly of said Frey), a distance of 79.50 feet to a iron survey point;

THENCE North 00 Degrees, 02 Minutes, 10 Seconds East, along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of said Frey), a distance of 1613.19 feet to a rebar survey point in the southerly line of lands of the Pennsylvania Electric Company (lands formerly of the U.S. Steel Corporation);

THENCE North 89 Degrees, 24 Minutes, 07 Seconds East, along said southerly line of lands of the Pennsylvania Electric Company (lands formerly of said U.S. Steel Corporation), a distance of 88.00 feet to a iron survey point;

THENCE North 00 Degrees, 02 Minutes, 10 Seconds East, along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of said U.S. Steel Corporation), a distance of 918.46 feet to a rebar survey point;

THENCE North 89 Degrees, 57 Minutes, 50 Seconds West, continuing along lands of the Pennsylvania Electric Company (lands formerly of said U.S. Steel Corporation), a distance of 8.50 feet to a rebar survey point;

THENCE North 00 Degrees, 02 Minutes, 10 Seconds East, along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of said U.S. Steel Corporation), a distance of 636.00 feet to a rebar survey point;

THENCE South 89 Degrees, 57 Minutes, 50 Seconds East, continuing along lands of the Pennsylvania Electric Company (lands formerly of the U.S. Steel Corporation), a distance of 8.50 feet to a rebar survey point;

THENCE North 00 Degrees, 17 Minutes, 20 Seconds East, along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of said U.S. Steel Corporation), a distance of 1132.01 feet to an iron survey point;

THENCE North 00 Degrees, 28 Minutes, 20 Seconds West, continuing along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of said U.S. Steel Corporation), a distance of 450.02 feet to an iron survey point;

THENCE North 00 Degrees, 02 Minutes, 10 Seconds East, continuing along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of said U.S. Steel Corporation), a distance of 495.72 feet to a rebar survey point;

THENCE northwardly, continuing along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of said U.S. Steel Corporation) and along a curve to the right having a radius of 1351.29 feet, a delta angle of 18 Degrees, 20 Minutes, 30 Seconds, an arc length of 432.58 feet to a rebar survey point;

THENCE northwardly, continuing along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of said U.S. Steel Corporation) and along a curve to the right having a radius of 1289.07 feet, a delta angle of 27 Degrees, 30 Minutes, 40 Seconds, an arc length of 618.96 feet to a rebar survey point;

THENCE northwardly, continuing along an easterly line of lands of the Pennsylvania Electric Company (lands formerly of said U.S. Steel Corporation) and along a curve to the right having a radius of 1344.20 feet, a delta angle of 26 Degrees, 21 Minutes, 10 Seconds, an arc length of 618.26 feet to a rebar survey point in the southerly line of lands of Conrail;

THENCE South 85 Degrees, 50 Minutes, 25 Seconds East, along said southerly line of lands of Conrail, a distance of 250.00 feet to a point and the point of beginning;

Containing 62.594 Acres, of land therein net measure.

Excepting and reserving all rights or interests that government agencies, municipalities or highway departments may have regarding the following:

West Middle Road, U.S. Route 20, Cross Station Road, Springfield Road, Neiger Road and Interstate Route 90.

Prepared by: William J. Mechlenburg, Jr., P.L.S.
Associate
David James Laird Associates

AGREEMENT FOR SALE OF REAL ESTATE

THIS AGREEMENT, made this 2th day of September, 2005, by and between:

SELLER: MATERIAL RECOVERY GROUP OF ERIE, INC., an Ohio corporation, with an address at P.O. Box 1102, Chardon, OH, 44024, hereinafter called "Seller";

AND

BUYER: NORTHWEST PENNSYLVANIA TRAIL ASSOCIATION, a Pennsylvania non-profit corporation, with an address at 3505 Tanager Drive, Erie, PA, 16506, hereinafter called "Buyer";

WITNESSETH THAT: Seller and Buyer, in consideration of the mutual promises hereinafter set forth and intending to be legally bound hereby, covenant and agree as follows:

1. PROPERTY AND TITLE. Seller shall, on the date hereinafter specified, by deed of special warranty, well and sufficiently grant and convey unto Buyer, in fee simple, clear of all liens and encumbrances, except as hereinafter set forth, good and marketable title (and such as will be insurable by any responsible title insurance company at regular rates) to all that certain piece or parcel of land, together with the buildings and improvements erected thereon, located in the Township of Girard, County of Erie, and Commonwealth of Pennsylvania, hereinafter called the "Property," and being more particularly described as follows:

Address: 11101 Ridge Road

Lot Size: Approximately 15 acres.

Index No.: (24) 8-62-1.00

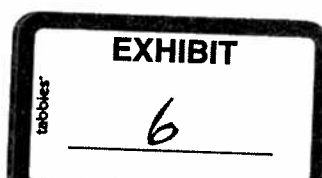
2. PURCHASE PRICE. As consideration for the conveyance of the Property, the Buyer covenants and agrees to pay to the Seller the sum of Eighteen Thousand dollars (\$18,000.00), money of the United States, payable as follows:

a. \$1.00 Earnest Money Deposit in cash or check upon the signing of this Agreement, receipt whereof is hereby acknowledged to be held in escrow by counsel for the Buyer;

b. \$6,000.00 to be paid in cash or by certified check at the time of close of sale and delivery of deed;

c. \$6,000.00 to be paid in cash or by certified check on or before September 30, 2006;

c. The balance of \$6,000.00 to be to be paid in cash or certified check on or before September 30, 2007. At the time of closing Buyer shall execute a promissory note and mortgage in favor of Seller in a form satisfactory to counsel for Seller in order to secure this



repayment obligation. No interest will be due on the two installment payments unless such payments are not made in a timely manner by Buyer. In the event that any payment is not made on or before the due date, interest shall be due and payable at the rate of 6% on any unpaid balance.

3. CONTINGENCIES. This Agreement is contingent upon each of the conditions set forth below. Inability of the responsible party to satisfy such contingencies on or before the date of settlement (or such shorter period as may be indicated hereinbelow) shall, at the option of the Buyer, render this Agreement null and void, and any Earnest Money Deposit made under this Agreement shall be refunded immediately. The contingencies are as follows:

a. Buyer, at Buyer's expense, procuring a satisfactory environmental site assessment (in Buyer's sole and reasonable opinion), indicating no evidence of violations of any environmental laws, regulations or ordinances, whether federal, state or local.

b. Buyer, at Buyer's expense, procuring a wetland delineation of the Property showing no jurisdictional wetlands present upon the Property that would frustrate Buyer's intended development of the Property as a bicycle trailhead.

4. CLOSING. Unless otherwise agreed, a closing shall be held on or before September 30, 2005 at the office of counsel for the Buyer.

5. PRORATION ITEMS. Real estate taxes shall be prorated as of the date of close as levied and assessed.

6. REALTY TRANSFER TAX. Realty Transfer Tax to be paid equally by Seller and Buyer.

7. DOCUMENTS. Each party shall pay the cost of preparation of deeds, mortgages, and other papers executed by them. Each party shall also pay its own closing costs.

8. POSSESSION. Buyer shall be entitled to exclusive possession of the Property at the time of closing. Seller covenants to deliver the Property to the Buyer at the time of closing in its present condition and free and clear of any equipment, trash or debris. Seller shall remove the old trailer, two containers, fuel tanks and any rubbish around the trailer. Seller shall not be required to remove the old railroad ties or timbers from the Property. Seller further covenants that it shall not commit waste at or upon the Property. Seller hereby represents and warrants that on and after the closing date, no other party shall have any possessory interests in the Property nor to the adjacent real property (excluding only the easement in favor of the Pennsylvania Electric Company dated February 17, 2000) described in a Donation Agreement concurrently executed by the parties hereto, consisting of approximately seven miles of bicycle trail (hereinafter "Trail"). To the extent that Seller has previously granted any license to any other party to utilize the Property or the Trail for any purpose, Seller hereby further represents and warrants that such license shall be revoked by Seller within 24 hours of the closing on the Property.

9. ZONING. The Property is zoned _____.

10. RISK OF LOSS. If, when neither the legal title nor the possession of the Property has been transferred to Buyer, all or a material part thereof is destroyed without the fault of Buyer or is taken by eminent domain, Seller cannot enforce this Contract and Buyer shall, at his option, thereupon be entitled to recover the Earnest Money and all monies paid on account of the purchase price, in which event both parties shall be relieved of all liability hereunder.

11. MUNICIPAL IMPROVEMENTS. Seller warrants that no notice of any municipal body or other public authority has heretofore been served upon him requiring work to be done or improvements to be made upon the Property, and that he has no knowledge of the enactment or adoption of any ordinance or resolution by any such body or authority authorizing work or improvements for which the Property may be assessed. Buyer will comply, at Buyer's own expense, with the requirements of any and all such notices which may be issued after the date of this Agreement and will pay for all work and improvements commenced or ordered by such body or authority after the date of this Agreement which may become a lien against the Property.

12. HAZARDOUS WASTE. Seller warrants that Seller has no knowledge, actual or otherwise, of any residual waste, as defined by the Pennsylvania Solid Waste Management Act, its amendments and any rules and regulations promulgated thereunder, or hazardous waste or substances, as defined by state and federal law, including the Pennsylvania Solid Waste Management Act; the Hazardous Sites Cleanup Act; the Resource, Conservation and Recovery Act; the Comprehensive Environmental Response, Compensation and Liability Act, their amendments and any rules and regulations promulgated thereunder, having been or which is presently being stored, treated, or disposed of on or about the Property.

13. TENDER. Formal tender of an executed deed and/or purchase money is hereby waived.

14. DEFAULT BY BUYER. In the event of default by Buyer, Seller may, at Seller's sole option, elect to:

a. Retain the Earnest Money and all monies paid on account of the purchase price as liquidated damages, in which case this Agreement shall become null and void and both parties shall thereupon be released of all further liability hereunder. It is hereby agreed that, without re-sale, Seller's damages will be difficult of ascertainment and that the Earnest Money and all monies paid on account of the purchase price will constitute a reasonable liquidation thereof and not a penalty.

In lieu thereof, however, Seller may elect either or both of the following remedies:

b. Apply the Earnest Money and all monies paid on account of the purchase price toward the purchase price and proceed with an action for specific performance; and/or

c. Apply said monies toward Seller's loss on the re-sale of the Property and proceed with an action at law for all damages sustained by Seller.

Provided, however, that no such election of (b) or (c) shall be final and exclusive until full satisfaction shall have been received.

15. DEFAULT BY SELLER. In the event of default by Seller, Buyer may, at Buyer's sole option, elect to:

a. Waive any claim for loss of bargain, in which event Seller hereby agrees to repay to Buyer the Earnest Money and all monies paid on account and, in addition, reimburse Buyer for all direct, out-of-pocket costs and expenses (i.e., title examination, survey, and attorney's fees).

In lieu thereof, however, Buyer may elect either or both of the following remedies:

b. An action for specific performance; and/or

c. An action at law for damages including loss of bargain.

Provided, however, that no such election of (b) or (c) shall be final or exclusive until full satisfaction shall have been received.

Provided further, however, that in the event Seller shall fail or be unable to deliver title to the Property as herein provided on account of title defects which Buyer is unwilling to waive and Seller notifies Buyer that Seller is unable to complete settlement hereunder notwithstanding Seller's good faith efforts to do so, then this Agreement shall automatically be null and void, and all earnest money shall be returned forthwith to Buyer as Buyer's sole remedy.

16. TIME OF ESSENCE. As to all time periods set forth herein, time shall be considered to be of the essence of this Agreement.

17. PERMITTED ENCUMBRANCES. Buyer shall take title to the Property subject to the following: (a) building and use restrictions of record; (b) vehicular or pedestrian easements of record affecting the Property and being contiguous to the front, rear, or side lot line; (c) water, sewer, gas, electric, and telephone lines or easements therefor of record, provided, however, that said lines or easements shall not adversely affect the use of the Property for residential purposes or at any time require the removal or alteration of the present existing dwelling(s) or appurtenant structures thereon; (d) prior grants, reservations or leases of coal, oil, gas, or other minerals as shown by instruments of record; and (e) easements apparent upon inspection of the Property, as long as none of the foregoing frustrate Buyer's intended development of the Property as a bicycle trailhead.

18. ENTIRE CONTRACT. This Agreement constitutes the entire contract between the parties hereto and there are no other understandings, oral or written relating to the subject matter hereof. This Agreement may not be changed, modified or amended, in whole or in part, except in writing, signed by all parties.

19. BINDING EFFECT. This Agreement and all of its terms and conditions shall extend to and be binding upon the parties hereto, and upon their respective heirs, executors, administrators, successors, and assigns.

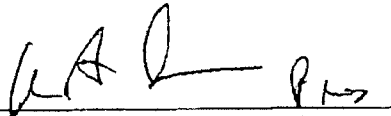
20. PROHIBITION AGAINST ASSIGNMENT. This Agreement shall not be assigned or transferred by the Buyer without the written consent of the Seller being first obtained.

21. COVENANT NOT TO RECORD. Buyer will not record this Agreement. Any recording of this Agreement shall constitute a default hereunder on the part of the Buyer. Seller and Buyer agree to keep this Agreement and all of its terms confidential.

WITNESS the due execution hereof the day and year first above written.

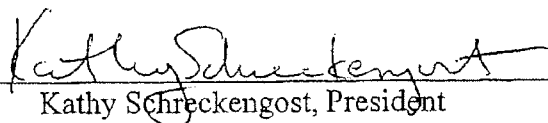
SELLER:

MATERIAL RECOVERY GROUP OF ERIE, INC.

BY:  (SEAL)
Richard A. Sommers, President

BUYER:

NORTHWEST PENNSYLVANIA TRAIL
ASSOCIATION

By  (SEAL)
Kathy Schreckengost, President

#630553

DONATION AGREEMENT

THIS DONATION AGREEMENT is made and entered into as of the 20th day of September, 2005, by and between **RICHARD A. SOMMERS**, his heirs successors or assigns, whose address is 10585 Somerset Drive, Chardon, Ohio 44024, hereinafter referred to as the "Grantor", and **NORTHWEST PENNSYLVANIA TRAIL ASSOCIATION**, a Pennsylvania non-profit corporation, whose address is 3505 Tanager Drive, Erie, PA, 16506, hereinafter referred to as the "Grantee".

WHEREAS, the Grantor is the owner in fee simple of certain real property situated in the Township of Girard and Township of Conneaut in Erie County, Pennsylvania, consisting of approximately seven 7 miles of trail and more specifically identified in Exhibit A, attached hereto and made a part hereof (hereinafter referred to as the "Property") and Grantor desires to donate the Property to the Grantee, a non-profit, 501-(c)(3) corporation;

WHEREAS, prior to making the donation, Grantor desires to allow the Grantee to use the Property for activities associated with the purpose of the Grantee; and,

WHEREAS, the Grantor and the Grantee agree to be bound by the following terms and conditions:

1. Grantor shall convey the Property to Grantee on or before January 3, 2006 by Quitclaim deed, free and clear of all liens and encumbrances, except for restrictions of record as of the date of this Agreement, zoning ordinances, taxes and assessments not currently due and payable. Grantor's obligation to transfer the property is contingent on the Grantees completion of all necessary rail banking documents and filings with the Surface Transportation Board to preserve the property's interim trail status.

2. Effective immediately and at all times prior to the conveyance date in Paragraph 1 above, Grantor hereby leases the Property to Grantee to be used for any lawful purpose associated with the activities of Grantee. In consideration of this grant of lease, Grantee hereby covenants and agrees that it will maintain the Property and pay all real estate taxes associated with the Property (including its pro rata share for any amounts previously paid by Grantor). Grantee hereby agrees to indemnify and defend Grantor from any liability associated with the use of the property unless such liability is due to the fault or negligence of the Grantor. Grantee covenants and agrees to utilize the Property as a trail under the Pennsylvania Rails to Trails Act (32 Pa.C.S.A. §5611 et seq.) and thereby provide liability protection to both Grantor and Grantee as set forth at 32 Pa.C.S.A. §5621.

3. In the event that the Grantee is dissolved, or otherwise ceases to exist as a non-profit organization, the property shall be donated to another similar non-profit organization to be selected by the Grantee with the reasonable approval of Grantor.

4. The Grantor agrees to have an appraisal performed at its own expense in order to determine the fair market value of the property being donated on or before the date of the closing.

KAS
KS
Sovereign
agency

5. The Grantee's obligation to accept the property is contingent upon each of the conditions set forth below on or before December 31, 2005. Inability of the responsible party to satisfy such contingencies on or before such date shall, at the option of the Grantee, render this Agreement null and void. The contingencies are as follows:

a. Grantee, at Grantee's expense, procuring a satisfactory environmental site assessment (in Grantee's sole and reasonable opinion) of the property, indicating no evidence of violations of any environmental laws, regulations or ordinances, whether federal, state or local.

b. Grantee, at Grantee's expense, procuring a wetland delineation of the Property showing no jurisdictional wetlands present upon the property that would frustrate Grantee's intended development of the property as a bicycle trail.

c. The successful close and sale of 11101 Ridge Road (Erie County Tax Index No. (24) 8-62-1.0) (i.e. the trail head) from the Grantor to the Grantee on or before September 30, 2005.

6. Grantor represents and warrants that no other party or parties has/have any possessory interests in the Property. Grantor covenants and agrees that it shall not interfere with any activities of the Grantee at the Property (assuming such activities are lawful and consistent with the terms of this Agreement) nor shall it mortgage or pledge any interest in the Property to any other party nor shall it restrict or otherwise encumber the Property in any way.

7. Grantor shall be permitted a period of 24 months from the date of the recording of the deed to re-enter the Property for the purpose of removing the cut stone tunnel from the Property. Grantor shall replace the cut stone tunnel with a 20" wide culvert. Grantor shall insure that the current stream crossing at the Property is preserved either in its present form or in a form that serves the same purpose or function. All work authorized hereunder shall be done in full compliance with all applicable environmental laws, regulations and ordinances, whether local, state or federal, including any municipal land use laws or restrictions and in a manner that presents a minimal amount of disruption to the Grantee's activities at the Property. Grantor will indemnify and defend Grantee from any liability occasioned by Grantor's negligence or Grantor's breach of this provision.

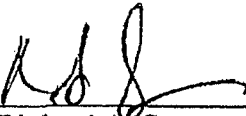
8. The parties acknowledge that in the event of a breach by either party of its obligations set forth hereunder, actual damages would be difficult or impossible to discern and therefore the non-breaching party shall be entitled to equitable relief, including specific performance and injunctive relief in order to compel the breaching party to abide by the terms of this Agreement.

9. This Agreement shall be governed by the laws of the Commonwealth of Pennsylvania.

10. If any portion of this Agreement is held to be unenforceable or invalid, the remaining portions of the Agreement shall remain in full effect.

IN WITNESS WHEREOF, this Donation Agreement has been executed and delivered as of the day and year first above written.

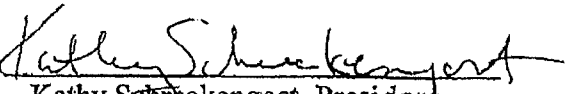
GRANTOR:



Richard A. Sommers

GRANTEE:

NORTHWEST PENNSYLVANIA
TRAIL ASSOCIATION

BY: 

Kathy Schreckengost, President

630554

EXHIBIT A

Property in Girard Township:

Erie County Tax Index No. (24) 7-22-19;
Erie County Tax Index No. (24) 7-25-6.0;
Erie County Tax Index No. (24) 8-62-11;
Erie County Tax Index No. (24) 8-63-22;
Erie County Tax Index No. (24) 20-67-24;
Erie County Tax Index No. (24) 20-68-12;
Erie County Tax Index No. (24) 21-72-3.0;
Erie County Tax Index No. (24) 21-72-4.0.

Property in Conneaut Township:

Erie County Tax Index No. (4) 5-10-11.

EXTENSION AGREEMENT

December 30, 2005

Material Recovery of Erie Inc.
P.O. Box 1102
Chardon, Ohio 44024

and

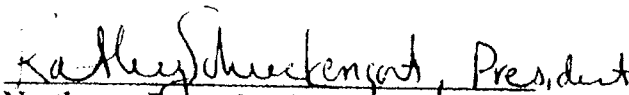
Northwest Pennsylvania Trail Association
3505 Tanager Drive
Erie, Pa 16505

Please be advised that by mutual agreement of the above referenced parties, we hereby extend the lease interest as defined in Section 2 of the Donation Agreement for the former railroad right of way in Girard and Conneaut Townships, Pennsylvania for a period of 90 days.



Material Recovery of Erie, Inc.

12/30/05
Date



Northwest Pennsylvania Trail Association

1/3/06
Date

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
W.D. Pennsylvania.
Victoria **WHEELER**, et al., Plaintiff,
v.

MATERIAL RECOVERY OF ERIE, INC., et al., Defendants.
C.A. No. 06-85 Erie.
March 30, 2007.

Donald B. Smith, Pittsburgh, PA, for Plaintiffs.

William Morton, Agresti, Morton & Moore, Neal R. Devlin, Knox, McLaughlin, Gornall & Sennett, Erie, PA, Walter A. Bunt, Jr., Arnold D. Dodderer, Kirkpatrick & Lockhart Nicholson Graham, Chad Allen Wissinger, Burns, White & Hickton, Pittsburgh, PA, for Defendants.

MEMORANDUM OPINION

SEAN J. McLAUGHLIN, J.

***1** This matter is before the Court upon a Motion to Dismiss or, in the alternative, for Summary Judgment, filed by Defendants' Northwest Pennsylvania Trail Association and **Material Recovery** of Erie, Inc., as well as Motions to Dismiss filed by Defendant FirstEnergy Corp and by Defendant Canadian National Railway.^{FN1}

^{FN1}. Given our ultimate decision to refer this matter to the Surface Transportation Board for the reasons discussed *infra*, we do not address the merits of the other arguments advanced by FirstEnergy and Canadian National Railway.

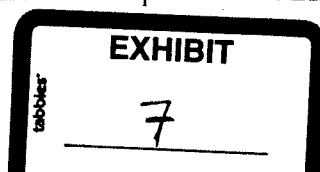
I. BACKGROUND

A. The Federal Railbanking Law

In 1983, Congress enacted Section 8(d) of the National Trails Systems Act, 16 U.S.C. § 1247(d) (hereinafter, the "Railbanking Act") to preserve the country's rapidly disappearing railway corridor infrastructure for future rail service and energy efficient transportation uses by permitting inactive corridors to be used on an interim basis as trails. The Railbanking Act is triggered when a railroad desires to terminate its common carrier obligation to provide freight rail service on a line, an action requiring approval from the Surface Transportation Board ("STB").^{FN2} 49 U.S.C. § 10903. When a qualified entity desires to negotiate with the railroad concerning the preservation of a corridor for future rail and interim trail use, it must request that the STB issue a railbanking order (known as a Certificate of Interim Trail Use ("CITU") or, as in this case, a Notice of Interim Trail Use ("NITU") by filing a statement of willingness to assume legal or financial responsibility over the corridor until such time as it is needed again for rail service. 49 C.F.R. § 1152.29(a).

^{FN2}. Prior to the creation of the STB by Congressional act effective January 1, 1996, this role was filled by the Interstate Commerce Commission.

Railbanking is voluntary on the part of the railroad. The Railbanking Act does not require the railroad to transfer the right of way for that purpose, nor impose any new obligations or restrictions on the



railroads. Rather, it allows the railroad to choose to discontinue rail operations "for an indefinite period while preserving the rail corridor for possible reactivation of service in the future," *Preseault v. ICC*, 494 U.S. 1, 6 n. 3 (1990), or to fully abandon the right of way and thereby permit state laws of reversion to take effect. Where a NITU or CITU is issued and a railbanking agreement is concluded, the corridor remains subject to the federal authority of the STB for so long as the trail use continues, and the corridor remains intact and potentially available for reactivated rail service. *Birt v. STB*, 90 F.3d 580, 583 (D.C.Cir.1996).

B. Factual Background

This case involves a six-mile long strip of land (the "Trail") that, prior to 1973, served a railway line owned and operated by Penn Central Railroad. Penn Central did not hold title to the land in fee simple, but rather, according to Plaintiffs, possessed an easement for railroad purposes, obtained by condemnation awards and releases. The Plaintiffs are the owners of the parcels of land adjacent to the Trail, as well as possessors of the reversionary interests in the Trail itself.

In 1973, Penn Central petitioned for, and was granted, permission to abandon service on the line. (Complaint ¶ 17). In 1976, Penn Central quitclaimed the Trail and the railway line to Bessemer & Lake Erie ("B & LE"), a subsidiary of Defendant Canadian National Railway. From 1976 until 1989, the Trail remained unused. (Complaint ¶ 21).

*2 In August, 1989, B & LE entered into a contingent agreement with Defendant **Material Recovery** to convey its quitclaim interest in the Trail to **Material Recovery** as part of the process of railbanking the Trail. (Complaint ¶ 22). On January 8, 1990, the Surface Transport Board ("STB") granted a NITU to B & LE and, subsequently, the Trail was properly railbanked and transferred to **Material Recovery**. (See January 8, 1990 Decision of the Interstate Commerce Commission ("1990 ICC Decision"), Complaint, Ex. B; Complaint ¶ 24). From 1990 to 1997, **Material Recovery** salvaged what remained of the railway line and removed the underlying fill, but, according to Plaintiffs, never developed hiking or biking trails on the Trail. (Complaint ¶ 25).

In 1997, **Material Recovery** entered into bankruptcy and, as part of the bankruptcy proceeding, sought leave to grant the Pennsylvania Electric Company ("Penelec") a utility easement over the Trail. (Complaint ¶ 26; Complaint, Ex. D). While in bankruptcy, the Plaintiffs intervened in the bankruptcy proceeding and asserted that their reversionary interests in the Trail's right of way had vested prior to 1990 as a result of the railway line falling out of use. (Complaint ¶ 27). The Bankruptcy court referred the Plaintiffs' challenge to **Material Recovery's** ownership of the Trail to the STB and, in 1997, the STB reopened the 1990 proceedings and issued a decision clarifying and re-affirming the railbanked status of the Trail.

Essentially, the STB reviewed the history of the Trail described above and concluded that, in 1990, the Trail had been properly railbanked. (1997 Decision of the Surface Transportation Board ("1997 STB Decision"), Complaint, Ex. C). It further stated that, "[b]ased on the evidence presented, we conclude that the property has not reverted to adjacent landowners." (*Id*). The STB couched its decision as an "advisory opinion" because it recognized that the property was under the jurisdiction of the bankruptcy court, and that, therefore, the final determination of legal ownership rested with that court. The STB further observed that "any agreement of sale between [**Materials Recovery** and Penelec] would require the continued preservation of the right-of-way for recreational use by the public or for reconversion to rail use" and that "to ensure continued rail banked status of the right-of-way, [**Materials Recovery** and Penelec] must comply with 49 C.F.R. 1152.29(f) ...". (*Id*). The Opinion, thereafter, quoted the applicable regulation, which provides that:

(1) When a trail user intends to terminate trail use and another person intends to become a trail user by assuming financial responsibility for the right-of-way, then the existing and future trail users shall file, jointly:

(i) A copy of the extant CITU or NITU; and

(ii) A Statement of Willingness to Assume Financial Responsibility by the new trail user.

(2) The parties shall indicate the date on which responsibility for the right-of-way is to transfer to the new trail user. The Board will reopen the abandonment or exemption proceeding, vacate the existing NITU or CITU; and issue an appropriate replacement NITU or CITU to the new trail user.

*3 (*Id.*). (citing 49 C.F.R.1152.29(f)).

Ultimately, the bankruptcy court permitted **Material Recovery** to sell a utility easement over the Trail right-of-way to Penelec, but declined to make a determination as to ultimate ownership. (Bankruptcy Court Order, Complaint, Ex. D).

In 2005, **Material Recovery** and the Northwest Pennsylvania Trail Association ("NWPTA") entered into an agreement whereby the NWPTA purchased property other than the Trail from **Material Recovery**. In addition, the parties entered into a separate agreement styled a "Donation Agreement" that contemplated the future donation of the Trail to NWPTA on or before January 3, 2006. (Agreement of Sale and Donation Agreement, Defendants' Concise Statement of Material Facts, Exs. D and E). Due in large measure to the pendency of this lawsuit, the Trail was never donated pursuant to the terms of the Donation Agreement.

On April 11, 2006, Plaintiffs filed this suit, alleging that **Materials Recovery** and the NWPTA had violated the provisions of 49 C.F.R. 1152.29(f) by transferring ownership of the Trail without fulfilling the regulatory requirements described therein. Plaintiffs assert jurisdiction under 28 U.S.C. § 1336(a) and 28 U.S.C. § 1331.

II. STANDARD FOR REVIEW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56 (c). In order to withstand a motion for summary judgment, the non-moving party must "make a showing sufficient to establish the existence of [each] element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In evaluating whether the non-moving party has established each necessary element, the Court must grant all reasonable inferences from the evidence to the non-moving party. *Knabe v. Boury Corp.*, 114 F.3d 407, 410, n. 4 (3d Cir.1997) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). "Where the record taken as a whole could not lead a reasonable trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* (quoting *Matsushita*, 475 U.S. at 587).

III. ANALYSIS

The engine that drives the present suit is the Plaintiffs' conviction that, prior to 1990, the various properties comprising the Trail had been legally abandoned under Pennsylvania state such that their reversionary interests were triggered. In essence, they believe that the Trail was improperly railbanked in 1990, and that, therefore, the 1997 STB decision erred in re-affirming the Trail's railbanked status. (See Plaintiffs' Memorandum in Response to Defendants' Motion to Dismiss ("Memo in Response"), Dkt. # 15, pp. 18-21).

However, pursuant to 28 U.S.C. §§ 2321 and 2342(5), an order of the STB is subject to exclusive review in the United States Court of Appeals in the Circuit within which the property is located. *Id.* "The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title." 28 U.S.C. § 2342(5). Thus, absent a timely appeal to the appropriate Circuit Court, an STB order cannot be directly or collaterally attacked in any other court. See *B.F.*

Goodrich Co. v. Northwest Industries, Inc., 424 F.2d 1349, 1352-53 (3rd Cir.1970).

***4** Having failed to perfect a timely appeal of the 1990 ICC and 1997 STB orders to the Court of Appeals for the Third Circuit, Plaintiffs rely on 28 U.S.C. § 1336(a), which states that "the district courts shall have jurisdiction of any civil action to enforce, in whole or in part, any order of the Surface Transportation Board ..." *Id.* In this instance, Plaintiffs are seeking to enforce the directive in the 1997 STB advisory opinion that required the parties to comply with the applicable regulatory provision for a transfer of ownership of a railbanked property, 49 C.F.R. 1152.29(f). Counsel for Plaintiff conceded this point at oral argument:

The Court: As I understand it, your position is that the NWPTA and **Material Recovery** are in violation of the language at page 2 of [the 1997 STB order], which sets forth the language of 49 C.F.R. 1152.29, is that correct?

Counsel: That and similar language from the 1990 as well.

(Transcript of Hearing on Motion to Dismiss ("Transcript"), January 18, 2007, p. 28).

This regulatory provision, as described above, requires the STB to "reopen the abandonment or exemption proceeding" as part of the procedure for transferring ownership of a railbanked property to a new trail user. By filing this suit under § 1336(a), Plaintiffs essentially seek a declaration that **Material Recovery** and the NWPTA violated the 1997 Order by transferring ownership without complying with the cited portion of 49 C.F.R. 1152(f) and that, as a result of this violation, the Trail has been abandoned.

The Court: Is it fair to say that primarily, and we'll talk about other issues if you think it necessary, but is it fair to say that primarily what the plaintiff is seeking to do here is enforce in this court the 1997 order of the STB, and in seeking to enforce that order, asking for a declaration from me that there has been noncompliance, material noncompliance with its terms and conditions?

Counsel: That's primarily what we're concerned with.

(See Transcript, p. 25).

While we acknowledge that 28 U.S.C. § 1336 properly vests jurisdiction in this Court to enforce the 1997 STB Order, our jurisdiction to determine whether there has been a violation of the regulatory provisions cited therein is not exclusive. In their summary judgment motion, Defendants' argue that primary jurisdiction for claims arising from 49 C.F.R. 1152.29 rests with the STB and that, accordingly, it would be proper to refer this matter to the STB for determination. Primary jurisdiction is a legal doctrine pursuant to which Courts may refer matters within the specialized purview of an administrative agency to that agency. *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956). A referral is particularly appropriate where the issue involved implicates the specialized knowledge of an administrative agency and when the referral would help maintain uniformity in decision making. *Atlantis Express, Inc. v. Standard Transp. Servs., Inc.*, 955 F.2d 529, 532-33 (8th Cir.1992).

***5** Each of the issues raised-whether the Donation Agreement and subsequent use of the Trail by the NWPTA triggered the requirements of 49 C.F.R. 1152.29, whether 1997 STB Order has been violated, and, ultimately, and whether either of those events might result in an abandonment and reversion of the Trail to the Plaintiff property owners-are precisely the type of issues that the STB routinely considers. See, e.g., *Barclay v. U.S.*, 443 F.3d 1368, 1374 (Fed. Cir.2006) ("The disposition of reversionary interests [is] subject to the [STB's] exclusive and plenary jurisdiction to regulate abandonments of railroad rights of way."); *Grantwood Village v. Missouri Pacific R. Co.*, 95 F.3d 654, 657 (8th Cir.1996) ("The ICC has exclusive and plenary authority to determine whether a rail line has been abandoned ..."). Plaintiffs do not dispute that a referral to the STB would be appropriate here, but instead argue that practical considerations should militate against it, as demonstrated by the following exchange:

The Court: Who better, particularly given the intricacies of the Railbanking Act, if you will, and it is a

rather, let's just say it's somewhat of a niche in the overall regulatory scheme, who better to determine what was meant by its own order, and who better to determine whether there has or has not been compliance with the provisions of the Railbanking Act ... than the very entity whose responsibility it is on a weekly basis to determine whether parties are or are not in compliance; isn't it the STB, rather than this court?

Counsel: In this particular case the District Court is going to have to, in the event that there's an appeal, make a final decision based on a number of the same arguments, and it's more a matter of a practical matter related to a financial concern for both parties, frankly, I think.

The Court:.... It really isn't your position, is it, that under all the facts here, the STB does not possess certain unique expertise here, which all things being equal, it would be appropriate to go to. It really is your position that, look it, judge, this has been going on for a lot of years and the shortest distance between two points is a decision by you, rather than you deferring in the first distance to the STB?

Counsel: I could not have put it better myself.

(Transcript, pp. 37-38).

We are certainly not unmindful of these concerns. Nonetheless, in light of the STB's institutional knowledge of this particular case as a result of having considered these issues in both 1990 and 1997, their familiarity with their own 1990 and 1997 orders, and their general experience in dealing with issues of this nature, we find that the benefits of referring this matter to the STB significantly outweigh the burdens.

IV. CONCLUSION

For the foregoing reasons, the Defendants' respective motions to dismiss or, in the alternative, for summary judgment are DENIED and this matter is referred to the Surface Transportation Board for further proceedings.

ORDER

*6 AND NOW, this 30th day of March, 2007, and for the reasons set forth in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that the Motion for Summary Judgment filed by Defendants' **Material Recovery** of Erie, Inc., *et al.*, the Motion to Dismiss filed by Defendant FirstEnergy, and the Motion to Dismiss filed by Defendant Canadian National Railway, are DENIED. This matter is referred to the Surface Transportation Board for further proceedings.

IT IS FURTHER ORDERED that the clerk of Court is Directed to mark this case closed.

W.D.Pa., 2007.

Wheeler v. Material Recovery of Erie, Inc.
Slip Copy, 2007 WL 1007595 (W.D.Pa.)

Motions, Pleadings and Filings ([Back to top](#))

- [2006 WL 3240931](#) (Trial Motion, Memorandum and Affidavit) Canadian National Railway Company's Motion to Dismiss the Complaint (Sep. 28, 2006)  [Original Image of this Document \(PDF\)](#)
 - [1:06cv00085](#) (Docket) (Apr. 11, 2006)
 - [2006 WL 1505504](#) (Trial Pleading) Complaint (2006)  [Original Image of this Document \(PDF\)](#)
- END OF DOCUMENT

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REAFFIRMATION AND EXTENSION OF DONATION AGREEMENT

THIS REAFFIRMATION AND EXTENSION OF DONATION AGREEMENT is made and entered into as of the 5th day of October, 2007, by and between **RICHARD A. SOMMERS/MATERIAL RECOVERY OF ERIE, INC.**, their successors or assigns, whose address is 10585 Somerset Drive, Chardon, Ohio 44024, hereinafter referred to as the "Grantor", and **NORTHWEST PENNSYLVANIA TRAIL ASSOCIATION**, a Pennsylvania non-profit corporation, whose address is 3505 Tanager Drive, Erie, PA, 16506, hereinafter referred to as the "Grantee".

WHEREAS, Grantor and Grantee originally entered into a Donation Agreement on September 20, 2005, whereby both parties contemplated the future transfer of a nearly six (6) mile long trail, subject to various conditions precedent, on or before January 3, 2006;

WHEREAS, one of the conditions expressly set out in the original Donation Agreement was that the Grantor and Grantee first obtain approval from the Surface and Transportation Board;

WHEREAS, Grantor and Grantee later agreed in writing on December 30, 2005 to extend the Donation Agreement for a period of 90 days;

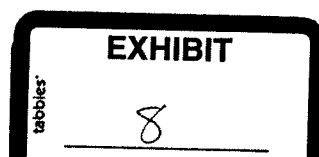
WHEREAS, after the extension period expired without ever completing the transfer, the Donation Agreement lapsed on its own terms;

WHEREAS, during all relevant time periods and until the STB grants approval of Grantor and Grantee's Joint Motion for Substitute Trail User, Grantor has and will continue to retain primary responsibility of the trail pursuant to 49 CFR 1152.29; and

WHEREAS, it is the intent of the parties to reaffirm and extend the terms and conditions of the original Donation Agreement.

NOW THEREFORE, with the intent to be legally bound, the parties agree as follows:

1. Grantor and Grantee hereby agree to extend the Donation Agreement, subject to the terms and conditions of the Reaffirmation and Extension Agreement provided herein, for a period of six (6) months commencing on the date of the execution of this Reaffirmation and Extension Agreement.
2. As in the Donation Agreement, the ultimate transfer and conveyance of the Trail is expressly conditioned upon STB approval.
3. Grantor hereby agrees to convey title to Grantee within thirty (30) days of the STB's final determination regarding the Motion to Substitute Trail User.



IN WITNESS WHEREOF, this Donation Agreement has been executed and delivered as of the day and year first above written.

GRANTOR:
MATERIAL RECOVERY OF ERIE, INC.

GRANTEE:
NORTHWEST PENNSYLVANIA
TRAIL ASSOCIATION

U A L Pres.
Richard A. Sommers, President

BY: (see next page)
Raymond Schreckengost, President

9/17/07
Date

Date

GRANTOR:
RICHARD A. SOMMERS

a s h
Richard A. Sommers

9/17/07
Date:

IN WITNESS WHEREOF, this Donation Agreement has been executed and delivered as of the day and year first above written.

GRANTOR:
MATERIAL RECOVERY OF ERIE, INC.

GRANTEE:
NORTHWEST PENNSYLVANIA
TRAIL ASSOCIATION

Richard A. Sommers, President

BY: *Karen Acker*
Karen Acker, Secretary

Date

Oct. 5, 2007
Date

GRANTOR:
RICHARD A. SOMMERS

Richard A. Sommers

Date:

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